No. 899-900

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1940

MAX HAMBURGER,

Petitioner,

vs.

JOHN A. DYER, TRUSTEE; LOUIS H. CHARBONNEAU, THOMAS N. DYSART AND HAROLD McB. THURSTON, constituting The Belcrest Apartments First Mortgage Bondholders' Committee; and MELVIN L. STRAUS AND CARL S. WELLES, indenture trustees,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To The Honorable: The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Max Hamburger, herewith applies for the issuance of Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review its judgments of January 17, 1941 affirming the decisions of the district court.

STATEMENT OF THE CASE

Preliminary Statement

These proceedings originated in the district court on respective petitions filed by Max Hamburger, the petitioner here, and Jacob Singer under Chapter XII of the Chandler Act. Subsequently these causes were consolidated for the purpose of administration because the principal asset was owned jointly. The district court on February 7, 1940 and February 19, 1940 entered certain orders from which appeals were taken by both Hamburger and Singer to the Circuit Court of Appeals in cause No. 8718 of that court. Subsequently, the district court on July 22, 1940 entered an order confirming a bondholders' committee's arrangement over their objections. They thereupon appealed to the Circuit Court of Appeals in cause No. 8822. That court consolidated the first two appeals, considered all three together, and on January 17, 1941 decided them in a single opinion. In this petition and the supporting brief reference must necessarily be had to the records in both Circuit Court cases as supplemented and filed with this court. Reference to the record in the first appeals, the larger record, will be indicated by "F. R." Reference to the record in the second appeal will be indicated by "S. R."

Statement of Facts

In 1925 petitioner Hamburger erected a large apartment hotel known as the Belcrest Hotel in the City of Detroit, Michigan (F. R. 25). A trust mortgage was executed thereon in the principal amount of $1,250,000 and bonds secured thereby were executed and sold to the public at large (F. R. 16-27). Later in the same year petitioner

sold a one-half interest in the property to Singer who did not however assume or agree to pay the mortgage (F. R. 51, 76). In 1929 Hamburger executed to Lulu E. Powers, as trustee, a quit claim deed as security covering the Belcrest and other property (F. R. 78-79) and at about the same time Singer did likewise (F. R. 78-79).

In 1930 petitioner and Singer turned over control and operation of the Belcrest Hotel to the trustees under the first trust mortgage. Later, that mortgage having gone into default, while the Belcrest was under the management and control of the trustee, the trustees filed their bill to foreclose in the state court, but no decree was ever entered (F. R. 35). Default also having occurred under the agreement pertaining to the quit claim deeds given to Lulu E. Powers, as trustee, foreclosure proceedings were begun thereon in the state court, but no decree was ever entered (F. R. 35).

On July 4, 1939 petitioner Hamburger and Singer filed their respective petitions with the district court under Chapter XII of the Chandler Act praying for relief thereunder (F. R. 13, 56). Made part of each of these petitions were schedules of assets and liabilities, statements of affairs and their proposed arrangement. On July 7, 1939 the court accepted jurisdiction, approved their petitions as properly filed under Chapter XII and appointed John A. Dyer, one of the respondents herein, trustee, (F. R. 57, 59). Subsequently on July 19, 1939 the court consolidated the causes for administration.

On February 7, 1940 the district court finding that the principal indebtedness on the first trust mortgage on the Belcrest Hotel was considerably in excess of the value of the property ordered that the claims of all creditors

(whether related to the Belcrest or not) subject and inferior to the unsubordinated bonds were without value and without right to participate in or vote upon *any* arrangement and that the debtors were without equity or interest of value in the premises and had no right to participate in *any* arrangement (F. R. 70-71). Later, on February 19, 1940, the court entered an order calling the first meeting of creditors to consider debtors' offer and also certain arrangements proposed by the bondholders' committee and by one Kowal. In that order the court directed the respondent trustee to mail out to creditors, along with the notice of the meeting, the proposed arrangement of the debtors as well as the proposed arrangements of the others together with a copy of the order of February 7, 1940 (F. R. 83-104). Petitioner and Singer appealed from these orders to the Circuit Court of Appeals (F. R. 71-73, 104-105) which consolidated them in cause No. 8718.

Meanwhile on July 22, 1940 the district court over the protests of debtors entered an order confirming the arrangement sponsored by the bondholders' committee, which of course entirely eliminated debtors from participation (S. R. 19-25). Debtors objected on the grounds, among others: That the bondholders' committee having failed to take the proper proceedings before the Public Trust Commission by whom it was licensed was without authority to propose or sponsor an arrangement; that the arrangement of the committee had neither been approved nor accepted by the debtors; and that in any event the arrangement was unfair and inequitable inasmuch as it amounted to a reorganization and liquidation of debtors' assets as distinguished from an arrangement; and that no proper provision was made for other creditors such as to discharge their claims in these proceedings

(F. R. 106-108). Debtors also objected to the order of confirmation on the ground that it was necessarily based upon the erroneous prior orders of February 7, 1940 and February 19, 1940, which eliminated debtors from participation in *any* arrangement and from the opportunity of presenting an amended arrangement.

On August 20, 1940 petitioner and Singer prosecuted their appeal to the Circuit Court of Appeals from this order of confirmation (S. R. 25). The Circuit Court of Appeals considered all three appeals simultaneously and on January 17, 1941 rendered its opinion affirming the orders of the district court. On the same day orders were entered by the court accordingly (F. R. 211, S. R. 43).

On February 12, 1941 the Circuit Court entered its order staying mandate in each of the causes for a period of thirty days to enable this petition for Certiorari to be filed (F. R. 217, S. R. 49). Subsequently on March 10, 1941 the stay was extended an additional fifteen days. Since the order for this additional stay was entered after the record was certified by the clerk of the Circuit Court, a copy is annexed to the brief in support of this petition and marked Appendix "A".

The Circuit Court of Appeals held, against debtors, that they and creditors other than unsubordinated bondholders were properly barred from participation; that their consent was not necessary to the confirmation of the arrangement proposed by the bondholders' committee; and that the decisions of this court under Chapter X were applicable to proceedings under Chapter XII of the Chandler Act. However, the court upheld the contentions of debtors that it was error to submit, before the first

meeting, creditors' proposals simultaneously with debtors'; that it was error to classify petitioner's individual and unrelated debts with those of Singer of the same nature; and that the arrangement confirmed did not discharge any obligations of debtors other than the unsubordinated bonds. But, it said, these errors were harmless.

QUESTIONS PRESENTED

1. In a proceeding under Chapter XII of the Chandler Act, where a secured debt is greater than the value of its security, can the court, *ipso facto,* say that debtor has no claim or equity of value and cannot participate in any arrangement which may be proposed.

2. In a proceeding under Chapter XII of the Chandler Act, where a secured debt is greater than the value of its security, can the court, *ipso facto,* say that other creditors have no interest of value and no right to participate in or vote upon an arrangement which also makes provisions for their separate benefit that do not affect the secured debts and the security?

3. In a proceeding under Chapter XII of the Chandler Act can the court bar creditors other than those holding unsubordinated bonds from participating in an arrangement and from settling their claims with debtor?

4. In a proceeding under Chapter XII of the Chandler Act can the court confirm an arrangement of the bondholders' committee which provides only for bondholders and makes no provision for debtor or other creditors solely because the value of their security is exceeded by the amount due on their bonds?

5. In a proceeding under Chapter XII of the Chandler Act can the court confirm an arrangement sponsored by the bondholders' committee, which provides only for themselves and no other class of creditors, especially when that arrangement has neither been consented to nor accepted by the debtor?

6. In a proceeding under Chapter XII of the Chandler Act, can the court, over objection of debtor, confirm an arrangement which provides only for one class of claims and leaves all others undischarged?

7. In a proceeding under Chapter XII of the Chandler Act can the court confirm an arrangement proposed by the bondholders' committee without a prior finding that such committee is a proper creditor and is authorized to act by the Public Trust Commission of the state of its organization which has licensed it?

REASONS FOR ALLOWANCE OF THE WRITS

The decision of the Circuit Court of Appeals has destroyed the generally accepted understanding of Chapter XII, and has effectively destroyed its purpose and usefulness. The questions involved (noted below) are of vital importance to individual debtors, and so far as we have been able to ascertain, have not been passed upon by any other court.

1. Is a real property arrangement under Chapter XII governed by the principles of compositions or by the absolute priorities rule of Chapter X? The Circuit Court's decision that arrangements are not compositions is in conflict with *Canada Southern Ry. Co. v. Gebhard,* 109 U.S. 527.

2. In such a proceeding has a debtor a right to make an offer to all classes of his creditors even though a secured debt is greater than the value of its security, or can the court bar him completely because of this fact?

3. In such a proceeding is an offer by a debtor which gives his creditors more than they will obtain on liquidation "fair and reasonable"?

4. In such a proceeding, if one offer by debtor is insufficient has he a right to make an amended offer, or can the court bar him completely?

5. In such a proceeding can a debtor who has voluntarily come into court because of his insolvency be compelled to accept an offer of one class of creditors which eliminates him and all other creditors?

6. In such a proceeding can the court without debtor's consent confirm an arrangement which provides for only class of creditors and leaves all other debts undischarged and undischargeable for at least the next six years, especially where debtor has made an offer of settlement to each and every class?

7. What relief can be obtained by an individual debtor under Chapter XII who seeks the aid of the court on the statutory ground of insolvency?

8. If a debtor in such proceeding cannot obtain the requisite consents of his creditors to his proposal, can he demand dismissal of the proceeding or adjudication of bankruptcy so that he can obtain complete relief from all debts?

9. Can a bondholders' committee invoke the jurisdiction of the Federal court without complying with the requirements of the state laws creating and controlling it?

These questions are novel and should be decided by this court in order to settle the practice in such cases so that individual debtors may be apprised of the relief or the limitations of the relief that may be had under Chapter XII.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays for the allowance of the Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in causes No. 8718 and No. 8822 respectively of that court to the end that such causes may be reviewed and decided by this Court and that the judgments of said Circuit Court of Appeals be reversed and for such other relief as to this Court may seem proper.

MAX HAMBURGER,
Petitioner.

By: MEYER ABRAMS,
HARRIS W. WIENNER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Sixth Circuit is printed in the first record at pages 212-217 and in the second record at pages 44-49 but is not yet officially reported.

JURISDICTION OF THIS COURT TO GRANT THE WRITS

a. The judgments of the Circuit Court of Appeals for the Sixth Circuit, review of which is hereby sought, were entered on January 17, 1941.

b. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347 (a)).

c. Review is hereby sought of bankruptcy cases in the United States Circuit Court of Appeals for the Sixth Circuit in which final judgments have been rendered.

STATEMENT OF THE CASE

The statement of the case is set forth in the Petition at pp. 2-6, and is here incorporated by reference. The following excerpt from the opinion of the Circuit Court (F. R. 212, S. R. 44) is helpful:

"Appeal No. 8718 involves two orders of the District Court, one entered February 7, 1940, and the other February 19, 1940. In the first order the court found that $1,157,000 in principal amount of the debts listed was represented by unsubordinated bonds; that the appraised value of the hotel did not exceed $550,000; that all creditors having claims inferior to the unsubordinated bonds would not be materially and adversely affected by any arrangement because their claims were without value, and ordered that such creditors should not participate in or vote upon any proposed arrangement. The court also decided that the debtors had no equity in the property, and hence had no right to participate in any proposed arrangement.

"In the order of February 19, 1940, the court ordered that an arrangement prepared by the bondholders' committee, and another proposal submitted by the representative of the second mortgagee, should be submitted to the creditors along with the arrangement proposed by the debtors. In this order the court classified the individual and unrelated debts of each appellant under the same classification."

"Appeal No. 8822 is from an order entered July 22, 1940, confirming an arrangement as modified, proposed by the bondholders' committee. The arrangement gave the benefit of the entire property to the unsubordinated bondholders. The District Court then discharged the debtors from all of their debts and liabilities except as specifically provided in the arrangement or in the order excluding such debts as are not dischargeable under the provisions of Section 17 of the Bankruptcy Act as amended."

The Circuit Court held that while it was error to submit to creditors offers other than debtors and to classify together unrelated debts of the two debtors such error

was harmless because the value of the hotel being exceeded by the amount of the lien thereon, neither debtors nor unsecured creditors could participate in any way. The court thereupon affirmed the orders in No. 8718.

The Circuit Court further held that the consent of the debtors was not required for a confirmation of an offer proposed by the creditors and therefore affirmed the order in No. 8822, except that it limited the debtors to the discharge only of those debts provided for by that arrangement (i.e., the bonds) and left the claims of other creditors undisposed of and undischarged.

POINTS RELIED ON FOR REVERSAL

1. A proceeding under Chapter XII of the Chandler Act is in the nature of a composition, and where a secured debt is greater than the value of its security, the court cannot, *ipso facto*, hold that debtor has no claim or equity of value and can not participate in any arrangement which may be proposed.

2. In such a proceeding, where a secured debt is greater than the value of its security, the court cannot, *ipso facto*, hold that other creditors have no interest of value and no right to participate in or vote upon any arrangement which also makes provisions for their separate benefit that do not affect the secured debt.

3. In a proceeding under Chapter XII of the Chandler Act unsecured creditors are entitled to participate in an arrangement and to settle their claims with the debtor.

4. In a proceeding under Chapter XII of the Chandler Act a secured creditors' arrangements which makes no provision for unsecured creditors cannot be confirmed.

5. In a proceeding under Chapter XII of the Chandler Act no arrangement can be confirmed without the consent or acceptance of the debtor.

6. In a proceeding under Chapter XII, a bondholders' committee cannot propose an arrangement before a finding that it is a proper creditor and before leave obtained from its controlling Commission.

ARGUMENT

I.

Under Chapter XII a Debtor Cannot Automatically Be Barred from Participation in Every Possible Arrangement Solely because a Secured Claim Exceeds the Value of its Security.

Petitioner Hamburger and Singer on July 5, 1939 filed their respective petitions with the lower court for a real property arrangement under Chapter XII of the Chandler Act (F. R. 13, 37). The schedules of each disclosed as assets their interest in the Belcrest Hotel which they owned jointly (F. R. 20, 51), and certain personal property. Each debtor also set forth as liabilities the claims of bondholders under the first trust mortgage on the Belcrest and the liability to Lulu E. Powers, as trustee (F. R. 17, 47). In addition thereto Hamburger scheduled certain unsecured creditors (F. R. 18) and Singer scheduled certain unsecured creditors (F. R. 48, 49), but these were in no way related to each other. Their proposed arrangement was attached to their petitions (F. R. 26-30, 56).

The district court on July 7, 1939 entered orders duly approving and accepting the petitions praying that the debtors "be afforded an opportunity to effect a real property arrangement under Chapter XII of the Chandler Act" as properly filed under said chapter (F. R. 57, 59). Subsequently, however, the district court on the petition of the trustee entered an order on February 7, 1940 finding that the value of the Belcrest property was exceeded by the amount due on the first mortgage, therefore barred both the debtors and the creditors other than first mortgage bondholders from participating in any arrangement which may be proposed in the proceeding (F. R. 67-71). It is the contention of petitioner that the district court had no authority thus to bar him and other creditors from participating by virtue solely of this finding.

An Arrangement Under Chapter XII is a Composition

Chapters XI and XII of the Chandler Act are outgrowths of and successors to the old bankruptcy compositions and extensions of Sections 12 and 13 and 73 and 74. (*Collier-Bender Pamphlet Edition*, 1938 *Bankruptcy Act*, page 6; *Moore's Bankruptcy Manual*, pages 631, 704). The preamble of the Act so states. (See 7 *Remington on Bankruptcy* (5th ed.) 156). These new chapters must therefore be construed and considered in the light of their history and the principles of compositions are directly applicable (*Remington* (*op. cit.*) page 156).

Arrangements of the type here involved have long been in use in England and can be found in the Bankrupt Law Consolidation Act of 1849 (12 and 13 Vict. c. 105). Similar provisions now exist under the Deeds of Arrangement Act of 1914. There also existed in England certain

provisions in the bankruptcy act itself dealing expressly with compositions and schemes of arrangement. Originally in the act of 1883 they now appear in the Bankruptcy Act of 1914. These arrangements have been construed by the English courts to mean agreements and compositions between a debtor and his creditors. (See *Tetley v. Taylor* (1853) 1 El. and Bl. 521, 540, 542, 118 Eng. Rep. 530). Similar provisions dealing with compositions and arrangements are to be found in the Canadian Bankruptcy Act of 1919, section 13, and Canadian Bankruptcy Act of 1919 as Amended (R. S. C., 1927, Ch. 11), section 11, *et seq.* These have also been construed as meaning a contract between the parties. (*Duncan, Law and Practice of Bankruptcy in Canada* (1922), page 214).

This court has also held that a "composition" partakes of a nature of a contract. (*Meyers v. International Trust Company* (1926) 273 U.S. 380, 383, 47 S. Ct. 372, 71 L. Ed. 692.)

In *Canada Southern Ry. Co. v. Gebhard,* 109 U.S. 527, this court held arrangements tantamount to composition agreements.

> "The confirmation and legalization of 'a scheme of arrangement' under such circumstances is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the non-assenting minority" (636).

Finally the Chandler Act itself assimilates an arrangement to a composition. Section 14(5) of the Act provides for denial of a discharge if within six years past bankrupt has been "granted a discharge, or had a composition or *an arrangement by way of composition* . . . confirmed under this Act".

Both the district court and the Circuit Court felt that the absolute priority rule of corporate reorganization cases must control. But in view of their history and the assimilation of arrangements to compositions, the district court's order of February 7, 1940 barring debtor and unsecured creditors from further participation solely because a secured claim exceeded the value of its security, must be held erroneous. The principle which must govern in Chapter XII proceedings as well as in compositions is: Does debtor's arrangement offer creditors as much as or more than his estate will pay in a bankruptcy distribution.

> 1 *Collier on Bankruptcy* (13th ed.) page 450;
> *In re Kinnane* (D. C. Ohio, 1914) 217 Fed. 488;
> *In re Waynesboro Drug Co.* (D. C. Ga., 1907) 157 Fed. 101.

Under the Canadian Bankruptcy Act above referred to the rule as to compositions and schemes of arrangements is the same:

> "In order to be reasonable the scheme must give the creditors a greater advantage than they would have in proceedings in bankruptcy . . . "
>
> *Duncan, op. cit.*, page 220.

Likewise under the English statutes. In *Re Ashmead-Bartlett,* 18 T.L. R. 68, affd. (1901) 1 K. B. 457, C. A., the court's approval of a scheme is reported thus:

> "That subsection (of the bankruptcy act) had been held to mean that the scheme must provide something more than the creditors would receive in bankruptcy."

We have been unable to find any reported cases under Chapter XII dealing with the present problem. However, under the analogous Section 74 of the Act prior to its

amendment, it was held that an offer of a debtor to pay his creditors more than the fair market value of his estate was made in good faith. (In *re Reaney* (D. C. Pa., 1938) 37 A. B. R. (N. S.) 252). In *Re Goldstein* (D. C. La., 1938) 22 F. Supp. 270, a proposal under Section 74 was approved by the court with the following statement (271):

> "It is true that he might have offered to share a larger proportion of his salary with his creditors, but the court is not aware of any law by which this can be compelled; the other alternative being adjudication."

Although the Circuit Court of Appeals relied upon the corporate reorganization cases, this Court has, in *Case v. Los Angeles Lumber Company,* 308 U. S. 109, carefully distinguished them. It there said:

> "The statutory scheme of Sec. 77B (in those respects which are material here) is in sharp contrast to that which was provided for compositions under former Sec. 12 . . . But Sec. 77B contemplates a procedure and results not permissible under Sec. 12. Reorganizations are nowhere referred to in the statute as compositions' . . . The general view was well expressed *In Re Dutch Woodcraft Shops,* 14 F. Supp. 467, 469, 'the preservation of business enterprises must not be at the expense of creditors, and the provision of Sec. 77B should not be taken advantage of to effect what, in fact, amounts to a composition under section 12'." (308 U.S. 109, 119, footnote 14).

The foregoing clearly shows that while an insolvent debtor might be eliminated under 77B, *ipso facto,* such result is not permissible in a composition proceeding, and conversely, an insolvent may participate in a composition, but not under 77B.

District Court Could Not Bar Debtors.

The authorities above cited conclusively establish that the court had no power under the statute arbitrarily to bar debtors from participating in any arrangement which might be proposed. That the property securing the first mortgage indebtedness is of less value than the outstanding bonds thereon (and this is the sole basis of the lower court's decision) affords no justification for the elimination of debtor from participation in any arrangement which may be proposed in the proceeding. Despite the fact that he is to participate, his offer may nevertheless give creditors more than any reasonably expected dividend on liquidation of his estate, and will therefore be "fair and equitable". This must be determined subsequently by the court on confirmation in deciding whether or not it was "for the best interests of creditors" under Section 472 (2). In view of the fact that these proceedings may be instituted only on the debtor's petition (Sections 422, 423) and that such petition must contain an arrangement proposed by him (Section 423) and in view of the further fact that the court on July 7, 1939 approved the petition as properly filed (F. R. 57), thereby approving the proposed arrangement as proper for submission and consideration, the order arbitrarily barring debtor is a misconstruction of the statute. Even if it could be said that debtor's proposal was not one that could be legally confirmed, even if accepted, the district court would still not be justified in barring him absolutely because he could still propose, with funds obtained from outside sources, an amendment such as would make the offer fair and equitable. But of course, by the positive terms of the order of February 7, 1940, debtors were prohibited from submitting their amended offer.

The decision of the Circuit Court in applying the rigid rule of priorities of the corporate reorganization cases must result in a perversion of the language and purpose of Chapter XII. It ignores entirely the statutory provision set forth in Section 423 that a person who is insolvent may on that ground avail himself of the Act. To say that such person may voluntarily (and all proceedings must be voluntary) file a petition and pray for relief at the hands of the court, and automatically be precluded from participating in any arrangement because of that same insolvency is inconceivable. Certainly no insolvent person will file such petition if he knows that his property will immediately and summarily be taken from him, particularly where, as in the instant case, he thereby surrenders his rights and period of redemption from a mortgage foreclosure yet to be completed.

In addition to the bondholders, debtors had other creditors (F. R. 18, 48-49). Provisions were made in their proposals for the compromise and settlement of these claims, but under the order of the district court of February 7, 1940, preventing the debtors and these creditors from participating in any arrangement proposed in the proceeding, such settlement by them even with these creditors was prohibited. Debtors were thereby precluded from settling with these classes of creditors even though the proceeds for such offer came from a source other than the property securing the claims of bondholders. This, we believe, was in direct violation of Section 461 defining an arrangement as an offer making provision for the modification or alteration of the rights of creditors of each and every class. Petitioner also objected in the district court, and the Circuit Court of Appeals in its decision has agreed (S. R. 47), that he will be in the peculiar position of having obtained a discharge as to

only one class of his creditors, i. e., those provided for in the bondholders' committee's offer, and will not be discharged from any of his other debts. Nor will he be able for the next six years to file another petition in bankruptcy and obtain a discharge as to those other creditors because of the provisions of Section 14a (5). As to debtor Singer the decisions of the lower courts are even more astounding. Since he did not assume the mortgage on the Belcrest and it will be the only claim discharged, he has undergone a bankruptcy proceeding which discharges him from *no liabilities* whatsoever, and at the same time precludes him from filing another petition for the next six years.

The district court order of February 7, 1940 barring the debtors and unsecured creditors from participating was in express violation of Section 435 which requires the court to send out to creditors for their consideration copies of debtors' proposed arrangement. The natural and reasonable effect upon debtors' proposal, accompanied by such a bar order, would be to render it ineffective and stigmitize it as already rejected by the court. Acceptances of their offer under such circumstances could hardly be expected. Thus debtors' absolute right to have the offer unqualifiedly submitted to all classes of his creditors for their consideration, particularly since it contained provision for settlement not only of the bondholders' claims but of all other claims, was effectively destroyed.

The questions hereinabove discussed insofar as we have been able to determine have not been passed upon by any other courts. They should be determined by this court in order that individual debtors shall know the purposes and consequences of proceedings under Chapter XII of the Chandler Act and the meaning of the words "fair and equitable" as there used.

II.

Under Chapter XII Unsecured Creditors Cannot Automatically be Barred From Participation in Every Possible Arrangement Solely Because a Secured Claim Exceeds the Value of its Security.

The district court in its order of February 7, 1940 not only barred the debtors from participation in any arrangement but similarly barred unsecured creditors.* The Circuit Court affirmed this, again basing its decision on the absolute priority rule of corporate reorganization.

As a corollary to the proposition advanced in the argument under Point I it follows that the court was without authority to preclude such creditors from participating in any arrangement which may be proposed. While it might be true that the value of the Belcrest property did not exceed the indebtedness due under the mortgage thereon this should not have prevented the participation by unsecured creditors.

The arrangement provided for in Chapter XII is in the nature of a composition. A debtor comes voluntarily into court and proposes a settlement of his debts with each and every class of his creditors, generally with funds borrowed from friends and relatives. In the present instance debtors proposed settlements or modifications not only of the claims of the bondholders, but also of the claims of other creditors (F. R. 30) by offering a certain percentage in cash. This consideration could effect the hotel property and bondholders neither one way or the other.

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*Unsecured creditors as used in this discussion are unsecured creditors and secured creditors whose claims are subordinate to the Belcrest bonds.

Under the provisions of the statute mentioned above, the debtors' right to come into court and make his offer to the various classes of creditors was unqualified, particularly when the offer to the unsecured creditors was to come from a source other than the Belcrest property. To hold otherwise as the Circuit Court has, would, we submit, defeat the purpose and intent of the entire chapter and would as before stated and as the Circuit Court held, place the debtors in a position where only certain of his debts are discharged and the others will remain outstanding against him. Section 461 requires that an arrangement (1) shall include provisions modifying or altering all rights of creditors secured by real property of debtor, (2) shall provide for the rights of all other creditors of debtor who may be affected by the arrangement. Certainly creditors who are not permitted to participate in the arrangement although the debtor has offered them a consideration are creditors affected by such arrangement. More important, however, is the economically unsound and unwise position in which the debtor is left with undischargeable claims. The district court in such case should either have dismissed the debtor's petition or adjudicated him a bankrupt, whereby he could obtain complete relief.

As the case now stands, petitioner must face the next six years, at least, with over $80,000 of undischarged debts outstanding against him. He is as much "unrehabilitated" now as he ever was. In fact, he is in worse position than if he had filed no petition, because he could have obtained complete relief in ordinary bankruptcy. What then is the use of Chapter XII? None, if the Circuit Court is right. The only construction which will give it any salutary effect is, as petitioner contends, that if a

debtor is unable to reach an agreement with his creditors, then his petition shall be dismissed or he shall be adjudicated a bankrupt, in pursuance of section 481 of the Act.

III.

Under Chapter XII of the Chandler Act the Court Cannot Confirm an Arrangement not consented or Agreed to by the Debtor.

Cause No. 8822 in the Circuit Court involved the appeal from the order of confirmation of July 22, 1940. By that order the district court confirmed an arrangement proposed by the Belcrest bondholders' committee which made provision only for their own claims and none whatsoever for other creditors of either debtor. Needless to say, this arrangement was not only not consented or agreed to by debtors, but was vehemently objected to by them. The Court of Appeals, again basing its decision on the fact that the value of the Belcrest property was exceeded by the amount of the debt due thereon, affirmed this order and once again held the rule of absolute priority in corporate reorganization cases applicable. It held (S. R. 45):

> "The statute neither expressly nor by implication provides for consent by the debtor to any arrangement . . . "

But we submit that the requirement of such consent is inherent in the theory and purpose of the chapter. Examination of its provisions discloses:

> A. The Act can be invoked only by the debtor, not by his creditors (Section 421, 422).
>
> B. No arrangement can be confirmed if debtor has done anything which would be a bar to the discharge of a bankrupt (Section 472 (4)).

C. If an arrangement is not accepted or consummated or confirmation is refused, the court must either dismiss or proceed with bankruptcy (Section 481).

D. If debtor defaults in consummating the confirmed arrangement the same result follows (Section 482).

E. The debtor must make the deposit before the arrangement can be confirmed (Section 468 (2)).

F. The arrangement may make provision for continuing the debtor in business (Section 461 (5)).

G. If debtor has been guilty of fraud, confirmation may be vacated and debtor adjudicated bankrupt (Section 511 (1)).

Only on the theory that a debtor's consent is required do these provisions take on significance. With any other construction, they are superfluous. Of course, the statute must be so construed that it shall all have harmonious meaning.

Moreover, being in the nature of an agreement between the debtor and his creditors and partaking of the same nature as compositions, debtor's consent is undoubted. Whether or not such consent is expressly required by the statute is immaterial. There was no such express requirement in the provisions of Section 12 of the old Act, but the court nevertheless required it. In the footnote to *Case v. Los Angeles Lumber Company, supra,* it is said:

> "Consent by the debtor to the composition was implicit in former Sec. 12 (cf. In *re Bryer,* 281 F. 812)."

The Circuit Court in ascertaining the intention of the framers of this chapter resorted to the House Report

of the 75th Congress (S. R. 46). Further examination of these same records will disclose the precise intent of the legislature with respect to the debtor's consent. It is there said (H. R. 1409, 75th Cong., 1st Session, 1937, page 52):

> "Proceedings under this chapter are voluntary only. The debtor must file his plan or arrangement together with his original petition. This clause permits a large creditor or large group of creditors to present proposals thereafter. *While the debtor is in no way bound by such proposals unless he consents to them,* there appears to be no good reason for denying creditors the privilege of submitting a plan of its own." (Italics supplied.)

The Honorable Walter Chandler, member of the 75th Congress and introducer in the House of the Act which now bears his name, has stated the same conclusion in an article in the American Bar Association Journal (Volume XXIV, No. 11, pp. 880, 884):

> " * * * Chapter XII, therefore represents the adjustments of debts secured by real property as well as unsecured debts of those who petition under the Chapter".
>
> "The right is limited to the debtor who may file an original petition or a petition in a pending bankruptcy proceeding if adjudication has not taken place. While the debtor is required to set forth in the petition the terms of his proposal, *his creditors may submit a proposal, which, however, cannot be confirmed unless it is accepted by the debtor*". (Italics supplied.)

Moreover, since Section 423 makes the chapter available to debtors on the ground of insolvency, it is inconceivable that an insolvent will petition for relief if credit-

ors can always force an offer upon him without his consent, particularly since those same creditors cannot institute the proceedings themselves. As stated in 87 University of Pa. Law Review 837, 839:

> "It would be illogical to have involuntary petitions under these chapters (XI and XII), for the debtor may decide to liquidate the business in a straight bankruptcy, whereas an arrangement contemplates its continuation."

Accord that debtor must consent:

> *Collier-Bender Pamphlet Edition,* 1938 Bankruptcy *Act,* p. 300;
> *Moore's Bankruptcy Manual,* p. 722.

The point in question is novel and has not been decided by any other of our courts, although there have been indications in support of our contention.

In *Kunze v. Prudential Insurance Company* (C.C.A. 5, 1939) 106 F. (2d) 917, the debtor's offer was rejected at the creditors' meeting. The court held that it could then only dismiss or adjudicate debtor a bankrupt where no further offer was made by debtor. To the same effect, *Preas v. Kirkpatrick and Burks* (C.C.A., 6, Nov. 9, 1940), C.C.H. par. 52801. In re *Goldstein, supra,* was a proceeding under Section 74 of the Act prior to its amendment. Confirmation of the proposal was there objected to for the reason that it was not for the best interests of creditors. The court held that it could not compel debtor to increase his offer; the only other alternative was adjudication.

Under the Canadian Bankruptcy Law above mentioned it has been expressly held that while creditors were en-

titled to propose amendments, such amendments were not binding upon the debtor until accepted by him. In *Martin v. Riman* (1930) 66 O.L.R. 394, the court said (396):

> "There is a provision in subsec. 1 of sec. 13 for the alteration or modification of the proposal by the creditors at the meeting. *This must necessarily be with the approval of the debtor, but there is no provision enabling the court to vary the proposal. It must either approve or reject the same.*" (Italics supplied.)

So too, in *Re Richardson* (1921) 1 C.B.R. 317, 190 O.W.N. 494, an approval was withheld pending production of further evidence because "The proposal of the debtors was varied by the creditors, and the consent of the debtor to the variation was not shown to have been given."

Most conclusive that debtor's consent to a proposal by creditors is necessary is the provision of Section 472(4), which provides that the court shall confirm an arrangement if satisfied that, among other things, the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt. If the debtor's consent were not required and an arrangement could be imposed upon him against his will, i. e., a reorganization of his assets as distinguished from an arrangement, we are unable to understand the intent and purpose of the provision referred to. If creditors could force through a plan they deemed most beneficial to themselves the conduct of the debtor would be immaterial. The conclusion is inescapable that Chapter XII was inserted in the act for the benefit and protection of the debtors and that relief thereunder should be given to them only if they approve the offer and the court is satisfied from their conduct that they are deserv-

ing. This is strengthened by the fact that this clause, which was formerly a part of Section 12d relating to compositions, has been construed as a *limitation on the power of the court to confirm a composition.*

See: In *Re Godwin* (D. C. Penn., 1903) 122 Fed. 111;
In *Re Comstock* (D. C. R. I., 1907) 154 Fed. 747.

Had Congress felt that the same rule should govern both proceedings under Chapter X and Chapter XII it would certainly have had no occasion for the extensive and elaborate provisions providing for arrangements. It would have been simple to have included under Chapter X voluntary but not involuntary proceedings by individuals. But Congress evidently felt that there was a vital distinction between a reorganization of a corporation and an arrangement of an individual's debts. Such a distinction is readily understandable, because a corporation is an artificial being whose existence is, for all practical purposes, co-extensive with its assets. If those assets are taken away or reorganized, the new or reorganized can begin afresh. As to individuals no such procedure is possible, because their own personal existence continues; their obligations still adhere to them.

IV.

A Bondholders' Committee Cannot Propose an Arrangement Prior to a Determination that it is a Creditor and Without Leave of its Controlling Commission.

Petitioner objected to the proposal by the bondholders' committee because there was not as yet a determination that the committee was a creditor. He also objected on

the ground that the committee had not obtained leave of the Public Trust Commission of the State of Michigan, under whose laws it was organized, to propose and sponsor such a plan.

The district court in its order of February 19, 1940 called the first meeting and provided that "claims of creditors shall be filed in the manner herein provided on or before April 1, 1940" and objections to such claims shall be heard on April 15, 1940 (F. R. 85, 86). Obviously no claims could or would be allowed at least prior to April 1, 1940 and as a matter of fact no claims were allowed until July 22, 1940 (S. R. 22). Until that time there was no adjudication that the bondholders' committee or anyone else was a "creditor". Its attempted offer of an arrangement on July 31, 1939 (F. R. 135) was therefor premature inasmuch as Section 466 provides for the proposals of arrangements approved by *creditors.*

The construction here contended for is the only one that can consistently be applied to this chapter as a whole. As we have repeatedly contended throughout this proceeding and throughout the proceedings in the lower court, the only person who could make an offer prior to the first meeting was the debtor himself. At that meeting the creditors appear, accept or reject the debtor's offer or make an offer of their own. This they can do because at that meeting the court is empowered by Section 436 "to receive proofs of claim and allow or disallow them" and thereby determine whether or not they are creditors. Although the Circuit Court of Appeals upheld our contention that the committee could not propose an arrangement prior to such first meeting, it held somewhat inconsistently that the proposal made by it prior to that time was nevertheless good.

Additional support for our contention will be found in the logical and chronological sequence of the various provisions as set forth in the chapter. Article IV provides for the petition, which must be voluntary, and stay. Article V provides for proceedings subsequent to the filing of the petition such as appointment of trustee, notice to creditors of debtor's offer and first meeting, and procedure at the meeting. Article VI provides in detail for the rights and duties etc. of the debtor and officers. Article VII deals with the creditors and their claims. Article VIII sets forth the provisions of an arrangement. Article IX now for the first time mentions the rights of creditors to propose amendments or modifications. Its very position in the chapter and its relation to the other parts thereof can lead but to the one conclusion that these rights of the creditors can be exercised only at or after the first meeting, and at or after the allowance of their claims.

The procedure taken by the district court was found by the Circuit Court of Appeals to be erroneous, but not prejudicial. We submit that the procedure taken effectively destroyed the statutory rights of the debtors to submit their offer to their creditors on an uncompetitive basis, unaccompanied by a canceling order of the court precluding their participation.

Furthermore objection was made to the confirmation of the proposal by the bondholders' committee because by the laws of the State of Michigan (Act No. 89 P.A. 1933, as amended) under which it was organized, it was first required to obtain leave of the Public Trust Commission created by that Act, to sponsor or propose the arrangement. Pertinent sections of the statute are set forth in Appendix B hereof.

Section 2(d) defines a protective committee so as to include the one presently involved. Section 3 requires that any person acting as a member of such committee shall first procure a license. Section 10 provides that "no protective Committee . . . shall take any action either by suit or otherwise . . . against either the property and/or business with respect to which said security was issued and/or against the person or persons who executed the security *unless and until authority to take such action has been conferred upon the protective committee by the commission.*"

Section 10 then further provides that if any committee desires to take such action it shall file application with the commission upon which the commission shall enter an order fixing the time and place for hearing. Section 19 provides that any person who violates the provisions of Section 10 shall be punished by a fine of not less than $500.00 or by imprisonment or both.

The record shows that no application was filed by the committee with the Public Trust Commission for leave to propose or sponsor the arrangement. Subsequently, at or about the time of the confirmation, the committee did obtain a letter from the Commission disclaiming jurisdiction and at the same time approving the procedure already taken. Aside from the obvious inconsistency of such action of the Commission, the belated approval was without legal effect. If there was no authority in the first instance to proceed it could not be cured, *post facto.*

By virtue of the statute above quoted the state has placed protective committees under its supervision and control and has required them to be licensed, and obtain leave to act. Like corporations they are made creatures

of the sovereign power and their authorities and duties depend upon the laws and statutes of that sovereign. The property being located in the State of Michigan and the committee having been organized and licensed under the laws of that state, those laws must control its powers and existence. (See *Chicago Title & Trust Company v.* 4136 *Wilcox Building Corporation,* 302 U.S. 120, 127; 6 *Fletcher Encyclopedia of Corporations* (Perm. Ed.) Section 2477, pages 176, 180).

The principle laid down in the *Chicago Title & Trust Company* case, *supra,* is directly applicable to the instant case. There a corporation which had been dissolved under the laws of the State of Illinois attempted to file a voluntary petition for reorganization under 77B. This Court held that it was without authority to do so saying:

> "The conclusion seems inevitable that if the state attach qualifications to its sentence of extinction nothing can be added to or taken from these qualifications by federal authorities" (128).

So in the instant case the state which has created the protective committee has in specific terms decreed that before any action can be taken, leave must be obtained from the Public Trust Commission upon application duly filed and heard. Without such permission, the committee has no more power to proceed than had the defunct corporation which attempted to reorganize itself. There was no power to invoke the jurisdiction of the federal court in either instance. We submit that the arrangement proposed by the bondholders' committee was a nullity because it was premature and without leave of the Public Trust Commission of the State of Michigan.

V.

CONCLUSION

Considerable comment has been made that to hold that a debtor's consent is required before an arrangement is confirmed, leaves him in control of the proceedings which he can then use for dilatory purposes. But our theory of the chapter permits no such results. If debtor's offer is promptly sent out to creditors and a first meeting called as the statute says, it will either be accepted or rejected in less than two months. If accepted it will forthwith be confirmed; if rejected, the petition is dismissed or debtor is adjudicated a bankrupt and relieved of all his debts as required by section 481. Delay in the instant case was occasioned by the fact the committee and another intervened and sent out their offers to creditors with debtors', which the Circuit Court held was error.

Recapitulating the contentions of petitioner, we submit: (1) that an arrangement is a composition, and a debtor, even if insolvent, may still propose a "fair and equitable" offer if it confirms to creditors as much as they would get upon liquidation; (2) that in any event, debtor should be allowed to settle his claims with unsecured creditors; (3) that no offer made by and for only one class can be confirmed without debtor's consent, leaving him with other claims undischarged; and (4) the committee's arrangement was void because premature and made without leave of the Public Trust Commission.

This court must accept jurisdiction and settle the problems here involved and rectify the confusion created by the decision of the Circuit Court of Appeals. The Writs should issue.

Respectfully submitted,

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APPENDIX A

Order of Circuit Court of Appeals for Further Stay of Mandate

(Entered March 10, 1941)

"It is ordered that the mandate herein be stayed for a period of fifteen days beyond the time heretofore granted by the court, pursuant to motion of appellants."

APPENDIX B

Act No. 89, P. A. 1933, amended by Act No. 205, P. A. 1933, amended by Act No. 218, P. A. 1935, amended by Act No. 212, P. A. 1937.

Section 2(d):

> "All persons who propose or purport to act, or who are now acting, for and in behalf of others and/or themselves with respect to a security and/or for the purpose of protecting and preserving the common interests of the holders or owners of the particular security."

Section 10:

> "No protective committee, either now in existence or hereafter to be organized which has procured the deposit of securities under and/or the consent of holders or owners of securities to a protective committee agreement, shall take any action either by suit or otherwise, or authorize any such action to be taken, for and in behalf of itself and/or the persons who have deposited their security under, and/or consented to the protective committee agreement, against either the property and/or business with respect to which said security was issued and/or against the person or persons who executed the security unless and until authority to take such action has been conferred upon the protective committee by the Commission."

[redacted]

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In the

Supreme Court of the United States

October Term, A. D. 1940

No. .....

MAX HAMBURGER,
Petitioner,

vs.

JOHN A. DYER, Trustee; LOUIS H. CHARBONNEAU, THOMAS N. DYSART and HAROLD McB. THURSTON, constituting The Belcrest Apartments, First Mortgage Bondholders' Committee; and MELVIN L. STRAUS and CARL S. WELLS, indenture trustees,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of the case is acceptable as far as it goes, but it is not complete. One controlling fact is omitted.

That is the fact that the Belcrest Hotel, the property covered by the first mortgage, is the only property involved in this case.

The finding of the Circuit Court of Appeals on this fact is contained in the second sentence of its opinion:

> "Appellants Hamburger and Singer each owned one-half of the Belcrest Hotel, which is the only real estate involved in the proceeding, and as this record shows, the only asset of the debtors." F. R. 212, S. R. 44.

Petitioner has not questioned this finding.

POINTS RELIED ON FOR AFFIRMANCE

(1) Under Chapter XII where a secured debt is greater than its security, an arrangement which permits the debtor or unsecured creditors to participate *in the proceeds of the mortgaged property* cannot be confirmed.

(2) In the instant case, the mortgaged property constitutes the only property of the debtors.

(3) The distinctions drawn by petitioner between arrangements and reorganizations are artificial and meaningless.

(4) In a proceeding under Chapter XII, an arrangement can be confirmed without the consent of the debtor.

(5) The Committee's arrangement was properly proposed.

ARGUMENT

I.

IN THE INSTANT CASE, SINCE THE MORTGAGED PROPERTY CONSTITUTES THE ONLY PROPERTY OF THE DEBTORS AND THE SECURED DEBT IS GREATER THAN ITS SECURITY, AN ARRANGEMENT WHICH PERMITS THE DEBTOR OR UNSECURED CREDITORS TO PARTICIPATE IN THE PROCEEDS OF THE MORTGAGED PROPERTY CANNOT BE CONFIRMED

Of the seven "Questions Presented" listed in the petition for certiorari, the first six are based upon an assumption of facts which are not present in this case, namely: the assumption that these debtors have assets other than the mortgaged property. Petitioner's favorite phraseology is:

> "Where a secured debt is greater than the value of its security, can the court, ipso facto, say * * *"

Now the truth of this case is that the court did not "ipso facto, say * * *." The orders appealed from are based not "ipso facto" upon the fact that the secured debt in this case is greater than the value of its security, but upon that fact plus the equally—perhaps more—important fact that the debtors have no other assets.

Petitioner, at the outset of his argument, tries to create a positive impression that there are other assets by stating "The schedules of each disclosed as assets their interest in the Belcrest Hotel which they owned jointly (F. R. 20, 51) and certain personal property."

This is a misleading statement. While some trivial items were scheduled as indicated, there are actually no assets involved in this case except the mortgaged property. The concurrent findings of fact of the District Court and of the Circuit Court of Appeals on this point are conclusive. *Vir-*

ginian Railway v. Federation, 300 U. S. 515, 542; *Pick Mfg. Co. v. General Motors Corp.*, 299 U. S. 3; *U. S. v. O'Donnell*, 303 U. S. 501, 508; *Continental Illinois Bank v. Chicago Rock Island & Pac. Railway*, 294 U. S. 648, 678; *Page v. Arkansas Natural Gas Co.*, 76 L.Ed. 1096, 1098.

With this fact in mind, what becomes of petitioner's arguments? His first two points as set forth in his brief are as follows:

I. Under Chapter XII a Debtor Cannot Automatically Be Barred from Participation in Every Possible Arrangement Solely Because a Secured Claim Exceeds the Value of its Security.

II. Under Chapter XII Unsecured Creditors Cannot Automatically be Barred from Participation in Every Possible Arrangement Solely Because a Secured Claim Exceeds the Value of Its Security.

Quite so. In some other case a debtor might have substantial assets in addition to the mortgaged property. But not here.

In this case, and on these points, our only contention is that neither the debtor nor the unsecured creditors may share in the proceeds of the mortgaged property.

We contend that the words "fair and equitable" as used in Chapter XII, Section 472, are words of art having a fixed meaning as determined by this court in numerous decisions. *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482; *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 109; *In Re Church Street Building Corp.*, 299 U. S. 24; *Securities and Exchange Commission v. U. S. Realty & Improvement Co.*, 310 U. S. 434; *Consolidated Rock Products Co. v. DuBois*, 85 L.Ed. 603.

Since, in the instant case, neither of the debtors have any assets outside of the mortgaged property, the decisions cited must be held to control the disposition of this case in its entirety.

II.

THE DISTINCTIONS DRAWN BY PETITIONER BETWEEN ARRANGEMENTS AND REORGANIZATIONS ARE ARTIFICIAL AND MEANINGLESS

Petitioner argues that there exist two legal conceptions, one known as a composition and the other as a reorganization. By arbitrarily classifying Chapters XI and XII as compositions, he endeavors to show that the construction placed by this court upon the words "fair and equitable" as used in Chapter X does not apply to the same words when used in Chapter XII.

We submit that these conceptions do not exist as classifications of legislation from which rules of construction may be drawn. We submit that every legislative act relating to compositions, arrangements or reorganizations must stand on its own feet and be construed according to its own provisions.

In the case of Chapter XII, Congress has specifically provided, Section 466, that the creditors may propose an arrangement. This one provision clearly precludes the classification of Chapter XII of the present act with Section 12 of the old act. In *Case v. Los Angeles Lumber Company*, supra, this court pointed out that Section 77B contemplates a procedure and results not permissible under Section 12. We contend that Chapter XII also contemplates a procedure and results not permissible under Section 12. If it does not, what is the purpose of Section 466?

III.

IN A PROCEEDING UNDER CHAPTER XII, AN ARRANGEMENT CAN BE CONFIRMED WITHOUT THE CONSENT OF THE DEBTOR

Section 466 of Chapter XII provides:

> "An arrangement which has been approved by creditors affected thereby, who hold debts against the property dealt with therein, amounting to 25 per per centum or more of the debts of some class of such creditors and 10 per centum or more of the debts of all such creditors, may be proposed by any such creditor."

It will be noted that this section provides certain conditions precedent to the proposal of an arrangement by creditors.

Under the established rule of statutory construction of *expressio unius est exclusio alterius* approved by this court in *U. S. v. Barnes*, 222 U. S. 513, 56 L. Ed. 291 where the legislature has specified certain requirements as conditions precedent to the exercise of a right, these express requirements must be construed to be the only requirements. Other requirements, in the instant case the consent of the debtor, may not be implied.

Similarly, the conditions precedent to the confirmation of a plan have been stated in Section 472 as follows:

> "The court shall confirm an arrangement if satisfied that—(1) The provisions of this chapter have been complied with; (2) It is for the best interests of creditors; (3) It is fair and equitable, and feasible; (4) The debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; (5) The proposal and its acceptance are in good faith and have not been made or procured by any means,

promises, or acts forbidden by this Act; and (6) All payments made or promised by the debtor, by any person issuing securities or acquiring property under the arrangement or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with and incident to the arrangement, have been fully disclosed to the court and are reasonable, or, if to be fixed after confirmation of the arrangement, will be subject to the approval of the court."

Again, there is no requirement that the debtor give his consent and, under the same rule of construction, no such requirement may be implied.

As cumulative evidence that Congress intended plans to be confirmed under Chapter XII without the debtor's consent, we respectfully refer to the following additional provisions of Chapter XII:

Section 461 which covers the provisions of arrangement reads in part as follows:

"Section 461. An arrangement—(12) Shall provide adequate means for the execution of the arrangement, which may include: * * * the sale or transfer of all or any part of his (the debtor's) property in trust or to one or more corporations theretofore organized or thereafter to be organized."

Section 475 reads as follows:

"The court may direct the debtor, his trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement."

If, as petitioner contends, no arrangement can be confirmed without the consent of the debtor, why was it necessary for Congress to provide that "the court may direct the debtor to execute conveyance of property," etc.? Obviously, the sole purpose of the two sections quoted above is to give the court the authority to consummate a fair and equitable plan even where the debtor opposes it.

IV.

THE COMMITTEE'S ARRANGEMENT WAS PROPERLY PROPOSED

Petitioner's final argument is that "a bondholders' committee cannot propose an arrangement prior to a determination that it is a creditor and without leave of its controlling Commission." There is no authority for this argument. The term "creditors" as used in Chapter XII is defined in Section 406(5) simply as follows: "Creditors shall mean the holders of claims."

Section 466 which sets up the conditions precedent to the proposal of an arrangement does not make the prior determination of claims at the first meeting such a condition.

Furthermore, since one of the functions of the first meeting is to "determine the written acceptances of creditors on a proposed arrangement" Section 436(4), to deny creditors the right to propose their arrangement before the first meeting as appellants insist should be done, would be to effectively prevent their arrangement from ever being voted on. That, obviously, is what appellant intends, but that, we submit, is certainly not what Congress intended.

The argument likewise is unsound in fact. Debtors' schedules set forth the mortgage (F. R. 16, 46). The affidavit of Sills (F. R. 129) filed in July of 1939, set out in

full the facts with respect to the mortgage indebtedness. The petition of the Committee proposing an arrangement filed in July, 1939 (F. R. 135) set forth the total outstanding unsubordinated bonds and the bonds deposited with the Committee as did the arrangement proposed (F. R. 148).

With respect to petitioner's argument that the Bondholders' Committee did not have leave of the Public Trust Commission to propose or sponsor the arrangement, petitioner states at page 31 of his brief:

> "The record shows that no application was filed by the Committee with the Public Trust Commission for leave to propose or sponsor the arrangement. Subsequently, at or about the time of the confirmation, the Committee did obtain a letter from the Commission disclaiming jurisdiction and at the same time approving the procedure already taken."

This statement does not correctly present the situation. The record with respect to the proceedings before the Public Trust Commission is incomplete. It is incomplete for the sole reason that petitioner has refused to supply a stenographic transcript of the proceedings before the District Judge. The facts are and the stenographic transcript would show:

(a) The protective committee at all times denied the necessity of any application to or order from the Public Trust Commission.

(b) The Public Trust Commission agreed with the position taken by the protective committee and disclaimed jurisdiction.

(c) Appellants insisted that the protective committee must have the approval of the Public Trust Commission.

(d) To eliminate this controversy as a possible ground for appeal, the District Judge directed that a hearing be

held before the Public Trust Commission and that their approval be obtained before he would confirm the arrangement in these proceedings.

(e) The Public Trust Commission gave notice of a meeting of bondholders for this purpose to be held July 8, 1940 and the meeting was duly held.

(f) Thereafter, on July 9, 1940, a representative of the Public Trust Commission appeared at a hearing held in these proceedings before the District Judge, was duly sworn as a witness and offered in evidence a copy of the Public Trust Commission's order approving and ratifying everything done by the protective committee in connection with their proposed arrangement.

The foregoing statement of facts not included in the record before this court is made for the sole purpose of correcting the statements of petitioner quoted above which are likewise unsupported by the record before this court.

On the question of the original proposal of the bondholders' plan, the District Court, in its order confirming the arrangement, found that

> "(a) All provisions of law or of the orders of this court heretofore entered with respect to the publishing and giving of notice of the hearings aforesaid, the time and manner of filing claims or acceptances of or objections to said proposed arrangement, and all other matters and things precedent to this order have been fully done and performed." (S. R. 20).

Where evidence is not preserved, the findings of the District Judge on the facts are controlling. *Kaschefsky v. Kaschefsky*, 110 Fed. (2d) 836.

Since the judgment of the District Court was affirmed, the concurrent findings of fact of the District Court and of

the Circuit Court of Appeals are conclusive. *Virginian Railway v. Federation,* supra; *Pick Mfg. Co. v. General Motors Corp.,* supra; *U .S. v. O'Donnell,* supra; *Continental Illinois Bank v. Chicago Rock Island & Pac. Railway,* supra; *Page v. Arkansas Natural Gas Co.,* supra.

CONCLUSION

The purpose of this brief has been two-fold: first, to call attention to the undisputed facts of the case; and second, to present the principles of law applicable to the questions arising out of those facts. We have not discussed the matter of the debtors' discharge for the reason that both the arrangement confirmed and the order confirming the arrangement provide for complete discharges for both debtors, the effect of the arrangement and the order confirming the arrangement has been questioned neither by these respondents nor by any creditor but solely by petitioner, the order confirming the arrangement was affirmed by the Circuit Court of Appeals without modification, and the comments of the Circuit Judge are purely *dicta* and not pertinent to the issues before the court.

In conclusion, we have shown that the debtors had no assets other than the mortgaged property, that under the decisions of this court neither the debtors nor the subordinate creditors may share in the proceeds of the mortgaged property, that Chapter XII contemplates a procedure and results not permissible under Section 12 of the old Bankruptcy Act, that the arrangement can be confirmed without the consent of the debtor, and that the Bondholders' Committee arrangement was properly proposed.

When the complete facts of the case as presented herewith are considered, it becomes evident that the novel questions framed by the petitioner are not before this court at all, and that for this court to accept jurisdiction to determine a series of moot questions would serve merely to further delay the orderly administration of this estate to the great damage of the bondholders and with no possibility of legitimate benefit to the debtors. The writs, therefore, should not issue.

Respectfully submitted,

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